IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1748 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DY.EXECUTIVE ENGINEER

Versus

JAYANTIBHAI CHHIMABHAI

Appearance:

MS SEJAL K MANDAVIA for Petitioner

M/S THAKKAR ASSOC. for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 16/06/2000

CAV JUDGEMENT

Learned Advocate Ms. Sejal K. Mandavia appearing on behalf of the petitioner and Learned Advocate Mr. D.M.Thakker appearing on behalf of the resondent. Rule Mr.D.M.Thakker Learned Advocate on

behalf of respondent is waiving the service of rule with the consent of both the Learned Advocates, the matter has been taken up for final hearing today. In the present petition, the award passed by the Labour Court, Surat in Reference No.62 of 1986 dated 14th October, 1998 has been challenged wherein, the Labour Court, Surat has granted reinstatement with continuity of service with full back wages of interim period. The respondent was appointed as a Seaman with effect from 14th August, 1980 and remained in service up to 29th September, 1982 and his service was terminated on 29th September, 1982. The said termination order was challenged by the respondent-workman before the Labour Court, Surat in Reference No. 62 of 1986. The statement of claim was filed by the respondent-workman and reply was submitted by the petitioner. The contention of the petitioner was that he was appointed on probation and his probation period was not found satisfactory and he was remained negligence and also remaining absence without prior permission and he was not found fit for the post. Both the parties were produced documentary evidence on record and also submitted written argument by both the parties. Before the Labour Court, the contention was raised by petitioner that respondent was working on probation for specific period, his work was not found satisfactory and by effluxion of time, his service was terminated and respondent was a daily rated employee and such termination cannot be considered to a retrenchment and Section 2(oo)(bb) is applicable and therefore, Section 25-F is not applicable. The contention of petitioner has been examined by the Labour Court and the Labour Court has come to the conclusion that service of respondent-workman was terminated on 29th September, 1982 after completion of probation period, the respondent was remained in service because, the probation period was six months from 14th August, 1980 but, respondent has completed more than two years continuous service and therefore, neither his service was extended on probation and nor he was made permanent. Therefore, respondent-workman was continued in service after completion of probationary period and therefore, his service was not terminated by effluxion of time as per terms and condition of probationer order and the Labour Court has also considered that service of respondent was terminated because of allegation, misconduct and stigma without holding departmental inquiry against the respondent. Therefore, the Labour Court has set aside the termination order and granted full back-wages as gainful employment has not been found to be proved by the petitioner. The reasons given by the Labour Court in paragraph 8 of the award that service of respondent-workman was not terminated in terms of order

of probation and therefore, Section 2(oo)(bb) is not applicable in the present case but, respondent was remained in service after completion of probationary period more than two years and service of respondent-workman was terminated because of misconduct, stigma and allegation without holding any departmental inquiry against the respondent-workman.

Ms. Mandavia submitted that the Labour Court has committed gross error not to appreciate the contention raised by the petitioner. She cited the decision of the Apex Court reported in 1997(8) Supreme Court Cases page-461. She also submitted that in present case the termination was 29th September, 1982 and dispute was raised in the year of 1986 after the period of four years even though, the Labour Court has granted full back-wages from date of termination. She also submitted that the reference was pending before the Labour Court in all twelve years and petitioner is a public body and State Authority has to bear the burden of full back-wages which ultimately the sufferer is public exchequer. Therefore, she submitted that the award of granting full back-wages is required to be interfered and Mr.D.M.Thakker appearing on behalf of respondent-workman has not seriously objected the contention of petitioner.

The contention of Learned Advocate for the petitioner relied upon the decision of the Apex Court reported in 1997(8) S.C.Cases page-461 to the effect that Life Insurance Corporation of India and Another v. Radhvendra Sheshgiri Rao Kulkarni wherein, it is observed that termination of probationer in terms of appointment letter does not amount to retrenchment. But, recently the said question has been examined by the Apex Court in case of Dipti Prakash Benarji v. Satyendra Nath Bose National Center for Basic Sciences, Culcutta and others reported in 1999 S.C.Cases Labour Court and Service page-596 wherein, it is observed by the Apex Court that it is true that the Supreme Court in some of the cases has held that termination order is not punitive where employer has been given suitable warning or has been advised to improve himself or whether he has been given a long rope by way of extension of probation. However, in all such cases there were simple order of termination which did not contain any words amounting to stigma. On the other hand, there is a stigma in the impugned order which cannot be ignored because, it will have effect on the appellant's future. Stigma need not be contained in termination order but, may also be contained in an order or proceeding referred to in termination order or in an Annexure thereto and would vitiate the termination order.

Similarly, in case of V.P.Ahuja v. State of Punjab and Others reported in 2000 A.I.R. Supreme Court Weekly page-792, the Apex Court has observed that a probationer, or temporary servant, is also entitled to certain protection and his service cannot be arbitrarily, nor can those service be terminated in a punitive manner without complying with the principle of natural justice. The termination order founded on the ground that the probationer had failed in the performance of his duties administratively and technically. Ex facie, is stigmatic. Such an order which, on the face of it, is stigmatic, could not have been passed without holding a regular inquiry and giving an opportunity of hearing to the probationer. Plea that, probationer cannot claim any right on post as his services could be terminated at any time during the period of probation without any notice, as set out in the appointment letter, cannot be contenanced. Thereafter, the recently the Apex Court in case of Narsing Pal v. Union of India and Others reported in 2000 A.I.R. S.C.Weekly page-1141 has observed in relying upon the decision of the Apex Court in Gujarat Steel Tubes Limited v. Gujarat Steel Tubes Mazdoor Sabha, A.I.R. 1980 S.C. page-1896. The relevant observation of paragraph-53 is as under :

" Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not be misdirected by terminological cover-ups or by appeal to psychic processes but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinised, the order has a punitive flavor in cause or consequences, it is a dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the matter is satisfied of the misconduct and of the consequent desirability of terminating the service of the deliquent servant, is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the inquiry and to proceeds to

terminate. Given an alleged misconduct and alive nexus between it and the termination of service the conclusion a dismissal. Even if full benefit as on simple termination are given and none injurious terminology is used.

Applying the above principles, the order in the instant, case, cannot be treated to be a simple order of retrenchment. It was an order passed by way of the punishment and, therefore, was an order of dismissal which having been passed without holding a regular departmental inquiry, be sustained."

The decision cited by Ms. Mandavia cannot be applicable to the facts of the present case because, in the present case the probation period was six months from date of joining 14th August, 1980 but, respondent-workman remain in service up to 29th September, 1982, meanwhile his service was neither extended nor terminated. The Labour Court has set aside the termination on the ground of misconduct without holding departmental inquiry therefore, question of retrenchment does not arise and service of respondent was not terminated as per terms of order of probation.

In view of above three decisions of the Apex Court in case of Dipti Prakash Benarji, V.P.Ahuja and Narsang Pal, the view taken by the Labour Court is legal, valid and proper. The finding recorded by the Labour Court that service of respondent has been terminated on the ground of misconduct and stigma without holding departmental inquiry is rightly set aside by the Labour Court and therefore, the order of the Labour court setting aside the termination and directing the reinstatement with continuity of service cannot required any interference by this Court.

Now question is required to be examined so far relating to the question of granting full back-wages of interim period as directed by the Labour Court. In the present case the termination was dated 29th September, 1982. Date of reference is dated 13th March, 1986 and date of award is 14th October, 1998. The net result is that a respondent who has worked about three years service with petitioner entitled the salary of 16 years without worked in between. Whether in such circumstances, the full back wages can be granted or not. The reference is pending before the Labour Court for final decision up to twelve years. Petitioner is a public body and State Authority. Respondent was not a

permanent workman. Considering these all aspects in such cases, the Apex Court has considered similar situation in case of H.M.T. Limited v. The Labour Court Ernakulam and Others reported in 1994(2) C.L.R. page-22. The Apex Court has observed that we don't find that any error has been committed by the High Court in up holding the award of the Labour Court reinstating the workman. However, we find that the dismissal of the workman was on July 30, 1979 and till date more than 14 years have elapsed. It is not accepted that no party should suffer on account of the delay in the decision by the Court. Taking all facts into consideration, we are of the view that it would meet the ends of justice in the present case if instead of full back wages, the workman concerned is given 60% back wages till he is reinstated. Similarly, recently such question has been examined by the Apex Court in the case of Management of M.C.D. Vs. Premchand Gupta reported in AIR 2000 S.C. Page 454. The Apex Court has observed that the reason for not granting full back wages from the date of his termination i.e. 29th April, 1986 till the actual reinstatement pursuant to the present order can now be indicated. Firstly, for no fault of the contesting parties, the litigation has lingered for more than 3 decades. To saddle the appellant corporation and its Exchequer which is meant for public benefit with full back wages for the entire period would be too harsh to the appellant Corporation. It is delay in disposal of cases in the courts that has created this unfortunate situation for both the sides. The respondent workman is also not at fault as he was clamouring for justice for all these years. however, this delay in courts proceedings for no fault of either sides permits us not to burden the appellant Corporation being a public body with full back wages for the entire period of respondent workman unemployment especially when no fault of either side actual work could not be taken from the respondent workman by the appellant Corporation. It is true that the respondent workman was always willing to work but he could not be permitted to work so long as the termination order stood against him. All these factors together point in the direction of not saddling the appellant Corporation, a public body with the burden of entire full back wages to be granted to the respondent workman after the passage of 33 years since his order of termination. The second reason is that the respondent workman for all these years could not have remained totally unemployed though there is not clear evidence that he was gainfully employed and was so well off that he should be denied complete back wages but keeping in view the fact that for all these long years fortunately the respondent workman had survived and has still 2 more years to reach the age

of superannuation as we are told not granting him full back wages on the peculiar facts and circumstances of this case would meet the end of justice. The appellant Corporation shall reinstate the respondent workman with continuity of service within 8 weeks from today and still also pay 50% back wages from the date of termination till his actual reinstatement in service of the appellant Corporation with continuity of service.

In light of the observations made by the Apex Court in two above referred cases, in the present case the termination of respondent workman was 29th September, 1982, he completed more than 2 years service. He was not a permanent employee. He raised dispute against the termination after the period of 4 years. The petitioner is a public body and state authority. The 12 years period has been passed in taking decision by the Labour Court in reference. Considering all these aspects and observations made by the Apex Court if the back wages for the period from the date of termination to date of reference is not granted to the respondent workman because of inaction on the part of the respondent workman not to raise dispute immediately after the termination, therefore respondent workman is not entitled to back wages from the date of termination i.e. 29th September, 1982 to the date of reference i.e. 13th March, 1986 and respondent workman is entitled to 60% back wages from the date of reference i.e. 13th March, 1986 to 14th October, 1998, date of award and full back wages from the date of award till the date of actual reinstatement. If such direction will be given in respect to the back wages of interim period which will meet the ends of justice between the parties.

Therefore, the award passed by the Labour Court, Surat in reference No.62 of 1986 dated 14th October, 1998 is modified qua back-wages as under confirming the direction of granting reinstatement with continuity of service.

The respondent-workman is not entitled any back-wages from the date of termination 29th September, 1982 to 13th March, 1986 and entitled the 60% back-wages from the date of reference 13th March, 1986 till the date of award 14th October, 1998 and full wages from date of award 14th October, 1998 till the date of actual reinstatement. Therefore, the award of granting full back wages by the Labour Court is modified as above.

Therefore, present petition is partly allowed. Rule made absolute to that extent and it is directed to

the petitioner to reinstate the respondent-workman with continuity of service with all consequential benefits as if, respondent-workman was deemed to be in service through out within a period of six weeks from the date of receiving the certified copy of this order. It is further directed to the petitioner to pay 60% back wages to the respondent-workman from the date reference 13th March, 1986 to the date of award 14th October, 1998 and it is further directed to pay full wages to the respondent-workman from the date of award 14th October, 1998 till the date of actual reinstatement within a period of eight weeks from the date of receiving certified copy of this order. It is further declared that respondent-workman is not entitled any amount of back wages from the date of termination 29th September, 1982 till the date of reference 13th March, 1986.

In view of the present petition is partly allowed. Rule made absolute to that extent. No order as to costs.

Date : 16-06-2000. (H.K.RATHOD,J.)

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